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IN THE

Supreme Court of the United States

October Term, 1942

No. 790

MARY CABALIK,
Petitioner

vs.

JOHN C. BELL, JR., Successor to William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Pittsburgh-American Bank and Trust Company,
Respondent

BRIEF FOR RESPONDENT

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I.

COUNTER-STATEMENT OF QUESTION INVOLVED

Can the enforcement of the rights of depositors and creditors against the stockholders of a banking corporation resulting from the merger of two corporations organized under the Pennsylvania Banking Act of 1876, P. L. 161—which imposes a double liability on stockholders—be declared unconstitutional as in conflict with the provisions of Section 1 of the XIV Amendment to the Constitution of the United States, solely because, subsequent to the organization of said constituent banks and the incurring by them of liabilities to depositors and creditors, the legislature of Pennsylvania enacted legislation granting similar banking powers to Corporations organized under the General Corporation Act of 1874, P. L. 73, which does not impose a double liability on stockholders?

II.

ARGUMENT

THE PITTSBURGH-AMERICAN BANK AND TRUST COMPANY WAS FORMED BY THE MERGER, UNDER THE PENNSYLVANIA MERGER ACT OF 1909, P. L. 408, OF TWO BANKS ORIGINALLY INCORPORATED UNDER THE PENNSYLVANIA GENERAL BANKING ACT OF 1876, P. L. 161, WHICH ACT IMPOSED A DOUBLE LIABILITY ON STOCKHOLDERS

The stockholders of the Roth's State Bank (which later had its name changed to Pittsburgh State Bank (R., p. 4a)) chose to incorporate under the Banking Act of 1876, P. L. 161, on the Sixth day of September, 1911, and began doing business with the general public on or about that date.

The stockholders of the American State Bank of Pittsburgh, Pa. (which later enlarged its banking powers to take on a trust business under the Pennsylvania Act of July 17, 1919, P. L. 1032 and changed its name to the American State Bank and Trust Company (R., p. 5a)) chose to incorporate under the same Banking Act of 1876 on the 14th day of September, 1920, and commenced doing business with the public on or about said date.

On or about June 11, 1931, under the terms of certain written Articles of Agreement bearing that date and pursuant to the authority of Letters Patent duly issued, the stockholders of the aforesaid banks merged their banking companies under the Merger Act of 1909, *supra*, and became

the Pittsburgh-American Bank and Trust Company (R., pp. 3a, 4a).

The Banking Act of 1876, P. L. 161, provided in Section 5 as follows:

> "The shareholders of any corporation formed under this Act, shall be individually responsible, equally and ratably, but not one for the other, for all contracts, debts and engagements of such corporation to the amount of their stock therein at the par value thereof in addition to the par value of such shares."

The stockholders of the constituent banks, which later merged to form the Pittsburgh-American Bank and Trust Company, became responsible for this statutory liability the moment they began doing business with the public. The Superior Court of Pennsylvania in *Harr, Secretary of Banking v. Boucher*, 142 Pa. Superior Court 114, 15 A. 2nd 699 (1940), has decided that this statutory liability is enforcible and that finding has been affirmed by the Supreme Court of Pennsylvania in this case.

Even the petitioner herein is willing to admit the constitutionality of the enforcement of this double liability at the time of its passage and up until the time certain enabling acts were passed extending the powers of corporations organized under the Pennsylvania General Corporation Act of 1874, P. L. 73 (See Petitioner's Brief, page 12).

It should be noted that Section 5 of the Banking Act of 1876, *supra*, contained this further provision:

> "That no corporation shall be organized under this act with a capital stock of less than fifty thousand dollars, divided into shares of not less

than fifty dollars each, which shall be deemed personal property and transferable on the books of the corporation in such manner as may be prescribed by the by-laws and articles of association thereof; and every person to whom stock shall be transferred as aforesaid, shall, in proportion to the shares received, succeed to all the rights and liabilities of the prior holders thereof, and *no change shall be made in the articles of association by which the rights, remedies or securities of the existing creditors of the corporation shall be impaired.*"

The statutory liability of banks organized under the Act of 1876 was never changed from May 13, 1876 until May 15, 1933—the date of the approval of the "Banking Code" of 1933. In the meantime William D. Gordon, the then Secretary of Banking, had taken possession of the business and property of the Pittsburgh-American Bank and Trust Company on the 25th day of September, 1931 (R., p. 8a).

In all of the legislation in Pennsylvania up until the date of this bank's closing there had never been any provision made to relieve the stockholders of a banking company of their statutory liability. On the contrary, there had been a continuous effort made by the Legislature of Pennsylvania to protect the rights of creditors and depositors.

As was said in Harr v. Boucher, *supra*, at page 121:

> "In authorizing the formation of banking companies by general and special acts the legislatures have held liable the stockholders of such institutions beyond their original investment long prior to 1876."

and several acts of that nature are listed in the footnotes on said page.

The Merger Act of 1909, *supra,* carried this provision in Section 3 thereof:

> "That all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, and the respective constituent corporations may be deemed to be in existence to preserve the same."

and the Merger Agreement of June 11, 1931, *supra,* also contained the provision:

> "Provided that all rights of creditors and all liens upon the property of each of the constituent corporations shall continue unimpaired, limited in lien to the property affected by such liens at the time of the creation of the same, and the respective constituent corporations may be deemed to be in existence to preserve the same."

Even the Banking Code of 1933, P. L. 624, provided in Section 614:

> "As to deposits in, and claims outstanding against, banks, bank and trust companies, or trust companies, upon the effective date of this Act the liability of shareholders shall be as heretofore provided by law."

The Supreme Court of Pennsylvania in *Bell vs. Abraham,* 343 Pa. 169, has said:

> "We conclude therefore, that the clearly expressed legislative intent, in Section 614 of the Banking Code of 1933, to continue the prior law governing the liability of shareholders, including

the provisions of Section 5 of the Act of 1876, in force, without intermission, unless and until such liability may have been terminated in the manner provided, must be given effect, * * *."

IN THE LIGHT OF THIS LEGISLATION AND THESE COURT DECISIONS ARE THE STOCKHOLDERS OF THE PITTSBURGH-AMERICAN BANK AND TRUST COMPANY NOW TO BE PERMITTED TO TOSS THEIR LIABILITY TO THEIR DEPOSITORS AND CREDITORS LIGHTLY ASIDE ON THE THEORY THAT IT IS NO LONGER ENFORCIBLE AGAINST THEM?

It is to be noted that long before the Legislature of Pennsylvania had enacted the Act of May 9, 1923, P. L. 173, giving banking powers to trust companies, the banking companies in question had been transacting business with their depositors and creditors.

When, as stockholders of a bank of discount and deposit, they invoked the privilege of incorporating under the Banking Act of 1876 they elected to incur the obligations of a stockholder's liability under said Act. They did business with the public on this basis.

HAVING ACCEPTED THE BENEFITS OF THE BANKING ACT OF MAY 13, 1876, THE STOCKHOLDERS ARE NOW ESTOPPED TO DENY THEIR STATUTORY LIABILITY

In *Aultman's Appeal*, 98 Pa. 505, where the statutory personal liability of corporate stockholders to corporate creditors was involved, His Honor, Chief Justice Sharswood said at the bottom of page 512 and top of page 513:

> "It has been earnestly contended that the individual liability thus imposed on the stockholders is a penalty, and that the courts of one state will not enforce the penal laws of another. This is undoubtedly so; but was this liability thus provided for in any sense a penalty? The defendants became owners of their stock either by original subscription or by assignment from subscribers and assumed voluntarily all the obligations imposed upon them as owners. It was a contract, express or implied, to pay not only for the stock owned or subscribed but so much in addition as would be necessary for the purpose of securing the creditors of the company. This contract could be enforced in any state in which the defendants were amenable to the process of the courts."

There is a case cited by petitioner in her petition at page 6 as authority for this appeal—*Abie State Bank v. Bryan* (1930), 282 U. S. 765 (75 Law Ed. 690). An examination of that case eliminates it as authority for her contention here.

The "Bank Guaranty Law" of 1909 of the State of Nebraska which was under consideration in that case was

referred to by your Honorable Court as a police regulation, but a law authorizing the incorporation of a banking company and fixing the liabilities of its stockholders, as in the case at bar, is not a police regulation. As His Honor, Chief Justice Hughes said in that case at the bottom of page 706 of Law. Ed. No. 75:

> "*When money is deposited in bank, the contract that is made is between that bank and the depositor.* Notwithstanding the provisions of the Bank Guaranty Law there is, properly speaking, no contract between the depositor and other banks. The Bank Guaranty Law provided for a fund to be raised by assessments upon all the state banks, and while this was regarded as an important safeguard to all depositors, it was but a police regulation the sanction of which lay in the constitutional power of the State and not in contract."

Those words of the Chief Justice, indirectly, really affirm respondent's contention in this case—that here is a contractual obligation, express or implied, the enforcement of which is protected by the Federal Constitution.

THIS RELATIONSHIP BETWEEN THE STOCKHOLDERS AND THE PUBLIC BEING CONTRACTUAL IN ITS NATURE, TO NOW PERMIT THE STOCKHOLDERS TO AVOID THEIR STATUTORY OBLIGATION TO THE CREDITORS OF THE COMPANY WOULD BE TO DESTROY THE PROTECTION WHICH THE FEDERAL CONSTITUTION THROWS ABOUT A CONTRACTUAL OBLIGATION IN ARTICLE I, SECTION 10, THEREOF

THERE IS A WELL ESTABLISHED PRINCIPLE OF LAW THAT THE DOUBLE LIABILITY ONCE ATTACHED TO THE STOCKHOLDERS CAN NOT BE DESTROYED BY SUBSEQUENT LEGISLATION

In the case of *Irvine v. Elliott*, 203 Fed. Rep. 82 it was held that:

> "Where a stockholder of an insolvent Ohio Railroad Company acquired his stock prior to the adoption of a constitutional amendment November 3, 1903, relieving stockholders from the double liability imposed by Ohio Const. 1851 Art. 13, Section 3, the stockholder's liability was not affected by the amendment."

On page 96 of said Reports the Court further said, in discussing the effect of subsequent legislation:

> "The double liability of all the stockholders, non-resident as well as resident, clearly was established by Section 3258 of the Revised Statutes in connection with the constitutional provision of 1851, and was not and could not under the constitution of the United States be destroyed, lessened or impaired in the case of Elliott and

others who, by their acquisition of stock, contractually assumed and became subject to the double liability for the benefit of all creditors of the Railroad Company.

> "A statute can not relieve a stockholder of an insolvent corporation from his double liability in favor of creditors whose rights have become vested under the Constitution, or prior statutes of the state."

Blackburn vs. Irvine, 205 Fed. Rep. 217.

In the case of *George M. Ochiltree v. The Iowa Railroad Contracting Company*, 88 U. S. 249 (22 Law. Ed. 546), where, by the Constitution of Missouri, adopted in 1865, a liability to double the amount of their stock was imposed upon stockholders in private corporations and this provision was changed by the amended Constitution of 1870, so that the liability did not extend beyond the amount of subscribed and paid up stock, it was held—

> "Those who subscribed for stock while the old Constitution was in force were and remained liable under the double liability clause of the Constitution."

As the Court said:

> "The incident of individual liability attached to and formed a part of the contract as long as it lasted, but its repeal did not deprive the plaintiff of any of the rights secured to him when the contract was made. They still exist, and the remedy to enforce them remains the same. If the corporation itself can not pay, the members who composed it at the time of the repeal are unaffected by it

and there is nothing in the way of subjecting them to the double liability provision."

We respectfully submit to your Honorable Court that the statutory liability imposed by the Pennsylvania Banking Act of 1876 as an incident of stock ownership in the constituent banks which were merged to form the Pittsburgh-American Bank and Trust Company is an obligation enforcible against the stockholders of said bank; that having invoked the privilege of incorporating under said Act and having done business with the public on this basis said stockholders are now estopped to deny their statutory liability; and that the relationship established between the stockholders of said bank and its depositors and creditors being contractual in its nature to now deny to the creditors of the company the right to enforce this statutory obligation against the stockholders would be to destroy the protection which the Federal Constitution has thrown about them.

Consequently, it is respectfully submitted, that the prayer of the petition for a Writ of Certiorari should be denied.

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